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Federal-State Water Problems

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FEDERAL-STATE WATER PROBLEMS

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Continued orderly development of western water resources under state law is seriously threatened by the federal government's claims to water rights and jurisdiction over water use. Mr. Moses considers the power bases which enable the federal government to make such claims, examining in particular those claims based on the Commerce and Property Clauses of the U.S. Constitution. Under the Commerce Clause he traces the development of the navigation power and the concomitant use of the navigation servitude to take property without compensation. With respect to claims under the Property Clause, he discusses the federal government's right to waters arising on reserved lands, including an analysis of the relevant cases and statutes. He concludes by commenting on the attempts by state courts to delineate the extent of federal power and by pointing out the numerous bills which have been introduced in Congress to resolve the federal-state conflict.

INTRODUCTION

PRIMARILY from the security afforded by state-granted water rights, much of the West has been transformed from the "Great American Desert" into an economically productive and socially inhabitable region. As the Public Land Law Review Commission[1] stated in its report to the President:[2]

> In nearly 100 years of development, state water law has achieved a reasonable certainty of results which has permitted substantial public and private development in the West. While sometimes necessarily complex, state administrative and judicial procedures have provided a means to determine security of rights to the use of water.[3]

However, the continued orderly development of the water resources in the 17 reclamation states[4] of the West is seriously threatened by claims of the United States which cloud the titles of countless numbers of citizens who have made valid appropriations under state law. As Floyd Bishop, the State Engineer of Wyoming, stated recently before the National Water Commission:

> One of the most important problems facing the Western States today relates to the so-called "Reservation Doctrine," and the related question of jurisdiction over water use and water rights. We feel that federal claims of reservation of unlimited quantities of water for use on federal reservations, with a priority as of the date of the reserva-

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[1] 43 U.S.C. §§ 1391-1400 (1964), *as amended* (Supp. IV, 1969).

[2] PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S RESOURCES (1970).

[3] *Id.* at 142.

[4] The 17 states usually considered the "West" are: Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming.

> tion, create a cloud over state-granted water rights which is intolerable. Such unquantified reservations would limit future development and discourage investment in water projects. National Forest Reserves in Wyoming cover most of the high water producing areas, and these forests were reserved prior to many of our state-granted water rights. The potential impact of the Reservation Doctrine on our State is significant. At its extreme it could seriously damage existing water users, and as a minimum it creates a cloud over future water development which needs to be removed.
>
> Jurisdiction over water resources and the authority to issue rights for the use of water must be clearly established if we hope to maintain an orderly system of water administration. Dual jurisdiction simply cannot work. The states have traditionally accepted and fulfilled this responsibility and there does not appear to be sufficient reason to modify this arrangement.[5]

The federal claims make it apparent, however, that the United States does feel a need to modify the traditional arrangement. Therefore, it will be the purpose of this article to consider the nature of the claims and discuss the ways in which the federal-state conflict might be resolved.

I. The Nature of the Federal Claims

The power bases which enable the federal government to claim a right to regulate water usage within the Western States are derived from five Constitutional grants of authority: the Welfare,[6] War,[7] and Treaty[8] Powers; and the Commerce[9] and Property[10] Clauses. While all are conceivably valid as power bases, the last two are those generally relied upon in asserting the federal claims and are, therefore, the most significant.

A. *The Commerce Clause*[11]

While the United States was still a young nation, conducting most of its commerce along its coast and on its navigable rivers, the Supreme Court held in *Gibbons v. Ogden*[12] that control of navigable rivers was vested in the Congress under the Commerce Clause.[13] Further, in *The Daniel Ball*[14] the Court more specifically defined the extent of Congres-

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[5] *Hearings Before the National Water Commission*, sitting in Denver (1969).

[6] U.S. Const. art. I, § 8(1).

[7] *Id.* While it might be thought to be strange to relate the use of water to the War Power, it may be recalled that the Tennessee Valley Authority was originally begun as a project to provide munitions. *See* Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936).

[8] U.S. Const. art. II, § 2.

[9] *Id.* art. I, § 8(3).

[10] *Id.* art. IV, § 3(2).

[11] *Id.* art. I, § 8(3).

[12] 22 U.S. (9 Wheat.) 1 (1824).

[13] *Id.* at 84. *Gibbons* declared the proposition that: "All America understands, and has uniformly understood, the word 'commerce' to comprehend navigation." *Id.*

[14] 77 U.S. (10 Wall.) 557 (1870).

sional control and stated what has since been the prevailing rule: All streams, tidal or fresh water, which are in fact navigable are subject to the navigation power of Congress under the Commerce Clause.[15] In discussing the effect of this rule, one commentator has stated that "[i]f a stream is navigable under this definition, federal power extends over its entire course, including its non-navigable stretches, and this power survives commercial disuse, whether for changed economic or geographical reasons."[16]

Yet the scope of the navigation power has not remained constant, but rather has been expanded. For example, on the strength of *Arizona v. California*,[17] it has been stated that "navigable" refers to any stream which has once been navigable, is navigable, or would be navigable after reasonable improvements.[18] Indeed, it has been suggested that "non-navigable streams which affect the navigable capacity of navigable streams are subject to the express exercise of the regulatory power."[19] Further, it has been held that it is not essential that navigation be the primary object of any federal program to improve a stream.[20] It is sufficient if navigation is one of the purposes for which the project is designed.

Hence, the federal regulatory power under the Commerce Clause is extremely broad. As one commentator has accurately summarized:

> Navigation has thus ceased to be the measure and limit of federal power. But, for reasons of history only, navigation remains the basis and the constitutional touchstone. Once navigation purposes are present, Congress may in effect use the waters of both navigable and non-navigable streams for whatever purposes and in whatever manner it wishes. In so doing, it can completely override any state water plan. It can prevent, in toto, state law from being applied to "federal" waters; or, on a lesser scale, it can prevent state law from being applied to federal waters in a particular situation where its application conflicts with the federal interest. Finally, as a matter of comity, it may submit to state regulation.[21]

While it is obvious from the foregoing that the federal claim to regulate water based on the navigation power can cause serious problems for the states, an equally egregious aspect of federal power which has developed from the Commerce Clause is the navigation servitude.

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[15] *Id.* at 563.

[16] 2 E. MORREALE, WATERS AND WATER RIGHTS § 101.1(A) (R. Clark ed. 1967) (footnotes omitted) [hereinafter cited as 2 E. MORREALE].

[17] 283 U.S. 423 (1931). The Court said: "And the federal government has the power to create this obstruction in the river for the purpose of improving navigation . . . ." *Id.* at 452.

[18] 2 E. MORREALE, *supra* note 16, § 101.1(C).

[19] *Id.*

[20] Arizona v. California, 283 U.S. 423, 454-56 (1931). The Court stated: "And the fact that purposes other than navigation will also be served could not invalidate the exercise of the authority conferred, even if those other purposes would not alone have justified an exercise of Congressional Power." *Id.* at 456.

[21] 2 E. MORREALE, *supra* note 16, § 101.2(A) (footnote omitted).

The navigation servitude is a dominant servitude which allows the federal government to take, without compensation, private property rights.[22] As stated in *United States v. 412.715 Acres of Land*:[23]

> In controlling, improving and regulating the navigability of waters the Government . . . may deepen channels, widen streams, erect lighthouses, build bridges, construct dams, and make similar improvements, without compensating the owners of land subject to the navigation servitude.[24]

Thus, even though the federal government may be spending vast sums of money on projects involving navigable waters, it may also be discouraging more significant investment by private developers who are wary of the right of the United States to change conditions on a navigable stream without compensating those damaged thereby. Even more serious, however, is the problem which arises when the federal government invokes the navigation servitude against an appropriator who has established a valid appropriation under the state law; for in such a situation, a valuable property right sanctioned by state law has been destroyed by a federal law without compensation. And given the wide scope of the navigation power, the threat of such a situation arising at any time and on virtually any stream within a state does, indeed, affect the security of a state-granted water right.

B. *The Property Clause*

The second major grant of authority under which the federal government claims a right to regulate the use of water within the states is the Property Clause which provides that "[t]he Congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state."[25] Based upon this clause, the argument is made that since all of the land now in the Western United States at one time belonged to the federal government (with the exception of Texas), the Western States did not acquire title to the public lands when they were admitted to the Union; therefore, unless the United States has disposed of such lands (and the water thereon), the federal government is still the owner.[26] The

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[22] The "navigation servitude" is an expression used to describe "[t]he rule that in the exercise of the navigation power certain private property rights may be taken without compensation . . . ." *Id.* § 101.3(A). Morreale is careful to point out that the scope of the navigation servitude is not commensurate with the navigation power as derived from the commerce power. *Id.*

[23] 53 F. Supp. 143 (N.D. Cal. 1943).

[24] *Id.* at 148.

[25] U.S. CONST. art. IV, § 3(2). For a discussion of the relationship of the Property Clause to federal-state water relations, see 2 E. MORREALE, *supra* note 16, § 102.

[26] 2 E. MORREALE, *supra* note 16, § 102.1.

effect of this argument is to subject nonnavigable waters[27] on public lands to the far-reaching powers of the Property Clause when those waters are not validly appropriated under state law.

While a discussion of the effect of certain federal acts on the question of the disposition of federally-owned waters[28] is not within the scope of this article, the prevalent view[29] is that the federal government did not dispose of its rights to such waters by the Act of 1866,[30] the Act of 1870,[31] or the Desert Land Act of 1877.[32]

Nevertheless, when the United States Supreme Court decided the case of *California Oregon Power Co. v. Beaver Portland Cement Co.*[33] in 1935, it seemed clear that the states had the right to determine the terms and conditions upon which individual appropriators would take title to the waters within the respective state boundaries. The Court stated:

> Second. Nothing we have said is meant to suggest that the act [the Desert Land Act], as we construe it, has the effect of curtailing the power of the states affected to legislate in respect of waters and water rights as they deem wise in the public interest. What we hold is that following the act of 1877, if not before, all non-navigable waters then a part of the public domain became *publici juris,* subject to the plenary control of the designated states . . . with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain.[34]

Many western lawyers, following the *Beaver Portland* decision, assumed that the states had complete control over the appropriation and use of the waters within their boundaries, subject only to the equitable apportionment of those waters with the other states through which such waters might flow. However, the inaccuracy of such an assumption was manifested by the decision in *Federal Power Commission v. Oregon.*[35] This case, known as the *Pelton* case, was the beginning

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[27] Navigable waters can be subjected to federal appropriation and regulation under the Commerce Clause as construed in Arizona v. California, 373 U.S. 546, 597 (1963).

[28] *See generally* 2 E. MORREALE, *supra* note 16, § 102.1. Morreale's argument on this question may be summarized thusly:

(a) The Desert Land Act of 1877, ch. 107, 19 Stat. 377, permitted states to establish water rights for severed waters actually put to beneficial use from public lands;
(b) The United States continued to share control of nonnavigable waters;
(c) In appropriation states, the United States remains owner of nonnavigable waters on public lands subject to displacement by downstream users through valid appropriations under state law;
(d) The United States as landowner may prevent further divestment of its water rights by withdrawing unappropriated waters from the state appropriation system (under the Property Clause). *Id.*

[29] 2 E. MORREALE, *supra* note 16, § 102.1.

[30] Act of July 26, 1866, ch. 262, § 9, 14 Stat. 253.

[31] Act of July 9, 1870, ch. 235, § 17, 16 Stat. 218.

[32] Ch. 107, 19 Stat. 377. The decision in Federal Power Commission v. Oregon, 349 U.S. 435, 448 (1955), held that the Desert Land Act did not apply to *reserved* lands.

[33] 295 U.S. 142 (1935).

[34] *Id.* at 163-64.

[35] 349 U.S. 435 (1955).

of a series of cases which clearly declared that the United States had not, in the opinion of the Supreme Court, divested itself of title to all of the waters of the West.[36]

In *Pelton* the Federal Power Commission had authorized the construction of a dam, one abutment of which was located on an Indian reservation, the other of which was located on a power site withdrawal.[37] Oregon objected to the construction, claiming that no compliance with Oregon law had been effected. The Court rejected this argument using the same rationale as was used in *First Iowa Hydro-Electric Co-op. v. Federal Power Commission*[38] which held that it would be impractical to permit the state to hold veto power over a federal project.[39] The Court said: "[T]o allow Oregon to veto such use, by requiring the State's additional permission, would result in the very duplication of regulatory control precluded by the *First Iowa* decision."[40]

Perhaps the real difference between the *Beaver Portland* and *Pelton* cases is that *Beaver Portland* upheld the right of the states to regulate the manner in which appropriations could be made from public lands, whereas *Pelton* involved reserved lands. In *Pelton* the Court said:

> The purpose of the acts of 1866 and 1870 was governmental recognition and sanction of possessory rights *on public lands* asserted under local laws and customs. [citation omitted] The Desert Land Act severed, for purposes of private acquisition, soil and water rights *on public lands,* and provided that such water rights were to be acquired in the manner provided by the law of the State of location.[41]

The Court went on to say that "these Acts are not applicable to the reserved lands and waters here involved. The Desert Land Act covers 'sources of water supply on the public lands . . . .' The lands before us in this case are not 'public lands' but 'reservations.' "[42]

For those who felt, after *Pelton,* that there was some hope that the United States did not claim or have authority to claim water for its reserved lands, the decision in *Arizona v. California*[43] convinced them that such was not the case. The contentions were raised in *Arizona* that the United States did not have power to reserve water on its

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[36] The Court rejected Oregon's argument that certain federal acts were delegations of power to the states to regulate the use of federal waters, stating that such acts applied only to public lands and the lands in question in *Pelton* were *reserved* lands. *Id.* at 443-44.

[37] 2 E. MORREALE, *supra* note 16, § 102.4(E) n.44.

[38] 328 U.S. 152 (1946).

[39] *Id.* at 164. The *First Iowa* decision involved a navigable stream, while *Pelton* involved a nonnavigable stream on reserved lands.

[40] Federal Power Comm'n v. Oregon, 349 U.S. 435, 445 (1955).

[41] *Id.* at 447 (emphasis by the Court).

[42] *Id.* at 448.

[43] 373 U.S. 546 (1963).

reserved lands after Arizona had been admitted to statehood and that the United States had never intended to reserve water for Indian reservations.[44] Both contentions were rejected, the Court stating: "We have no doubt about the power of the United States under these clauses [the Commerce Clause and art. IV, § 3 of the Constitution] to reserve water rights for its reservations and its property."[45]

The decisions of *Pelton* and *Arizona* offered little comfort to most of the West since vast quantities of land within the region are covered by federal reservations, *e.g.,* the national forest reserves. Consequently, to combat the effect of the decisions, the Western States have raised the ingenious "equal footing" argument which is based on the proposition that any new state is entitled to be admitted on an equal footing with the original 13 states.[46] Ergo, since the United States did not claim waters of the 13 original states as the sovereign, the Western States should likewise be free of such claims.[47] However, as one commentator has noted:

> Two things are clear. Claims of the United States to unappropriated nonnavigable western waters based on original ownership of the public domain in no way conflict with the equal-footing clause. While the court has never expressly said so, the *Winters* and *Pelton Dam* cases clearly imply that claims to such waters are based on proprietary rather than on sovereign rights of the United States.[48]

The effect of the early federal legislation, therefore, is apparent. *Beaver Portland* was concerned with private rights of private claimants and did not concern federal ownership or sovereignty; and further, the case is not authority for the proposition that the Desert Land Act or earlier legislation effected the wholesale transfer of water or ceded any property to the Desert Land Act states.[49] Perhaps the most that can be said for *Beaver Portland* is that it reaffirmed the right of the states to determine the manner in which private individuals could obtain property rights in waters on public lands.[50] However, there has been less certainty about the language in *Pelton* and *Arizona.* Indeed, the confusion sparked by those two cases with respect to both the federal claims and the extent of such claims has resulted in continuing controversy between the state and federal governments.

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[44] 2 E. MORREALE, *supra* note 16, § 102.4(F).

[45] Arizona v. California, 373 U.S. 546, 598 (1963).

[46] 2 E. MORREALE, *supra* note 16, §§ 102.5-.6.

[47] The argument was raised but not decided in Nebraska v. Wyoming, 325 U.S. 589, 611 (1945).

[48] 2 E. MORREALE, *supra* note 16, § 102.6 (footnote omitted).

[49] *Id.* § 102.7.

[50] What *Beaver Portland* did say was that land taken under a government patent is severed from the water rights thereon. Hence forward, all nonnavigable waters on patented lands would "be reserved for the use of the public under the laws of the states and territories named." California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 162 (1935).

II. Resolution of the Federal-State Conflict

There have been several attempts to resolve or at least clarify the federal-state conflict which arose from *Pelton* and *Arizona.* In general, the attempted resolutions have been proposed by state court adjudications or by bills introduced in Congress.

A. *State Court Adjudication of Federal Water Rights*

It can be suggested that the proper place to settle a dispute concerned with federal and state claims to waters is in court. Efforts at such adjudication have been attempted numerous times, but have been generally unsuccessful.[51] A major reason for this lack of success is that the United States is immune from suit in the absence of its consent.

However, this difficulty was at least partially alleviated in 1952 when Congress waived the sovereign immunity of the United States by enacting the so-called McCarran Amendment.[52] The amendment provided in part:

> Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit.[53]

The amendment, by its terms, is limited to a water adjudication where parties seek to settle their water rights as against all other users asserting a right in a common source. By judicial decision the amendment has been further limited to deny individual suits against the United States.[54]

One significant case[55] has been brought in Colorado under the McCarran Amendment. It involved a recent water adjudication proceeding in Colorado water district No. 37 (the Colorado River District) in which the petitioner in a supplemental adjudication proceeding served the United States with process. The United States appeared and moved to dismiss for lack of jurisdiction, claiming that under the Colorado law only segments of the stream were adjudicated and that this type of proceeding did not conform to the requirements of the McCarran Amendment.[56] The trial judge overruled the motion to dismiss, causing the United States to obtain a temporary writ of prohibition from the Colorado Supreme Court.

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[51] For a general discussion of suits against government officers as a means for adjudicating the federal government's water rights, see 2 E. Morreale, *supra* note 16, § 106.1.

[52] Suits for Adjudication of Water Rights, 43 U.S.C. § 666 (1964).

[53] *Id.*

[54] Dugan v. Rank, 372 U.S. 609, 618 (1963).

[55] *See* United States v. District Court, 458 P.2d 760, 762 (Colo. 1969) for a statement of the lower court proceedings.

[56] *Id.* at 762.

In an opinion delivered by the Colorado Supreme Court, the writ was quashed. Mr. Justice Groves, in deciding the case, cited *Beaver Portland*[57] and section 8 of the Reclamation Act[58] to support the court's finding that water rights should be acquired under the provisions of state law. The court quoted from a report of the Senate Judiciary Committee which had been written after consideration of a bill containing provisions similar to those included in the McCarran Amendment. The report, as adopted by the court, stated:

> In the administration of and the adjudication of water rights under State laws the State courts are vested with the jurisdiction necessary for the proper and efficient disposition thereof, and by reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights. Accordingly all water users on a stream, in practically every case, are interested and necessary parties to any court proceedings. It is apparent that if any water user claiming to hold such right by reason of the ownership thereof by the United States or any of its departments is permitted to claim immunity from suit in, or orders of, a State court, such claims could materially interfere with the lawful and equitable use of water for beneficial use by the other water users who are amenable to and bound by the decrees and orders of the State courts. Unless Congress has removed such immunity by statutory enactment, the bar of immunity from suit still remains and any judgment or decree of the State court is ineffective as to the water right held by the United States. Congress has not removed the bar of immunity even in its own courts in suits wherein water rights acquired under State law are drawn in question. The Bill (S. 18) was introduced for the very purpose of correcting this situation and the evils growing out of such immunity.[59]

Mr. Justice Groves continued by holding: "Therefore, we conclude that a proceeding under C.R.S. 1963, 148-9-7 in Water District 37 — or any other water district — constitutes an adjudication of rights to the use of water of a *river system* contemplated by the McCarran Amendment."[60]

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[57] *Id.* at 764.

[58] *Id.*

[59] Senate Calendar No. 711, Report No. 755, Sept. 17, 1951.

[60] United States v. District Court, 458 P.2d 760, 766 (Colo. 1969), *cert. granted,* 397 U.S. 1005 (1970). It should be noted that while the court's decision was based upon COLO. REV. STAT. ANN. § 148-9-7 (1963), which was repealed by Act of June 7, 1969, ch. 373, § 20, [1969] Colo. Sess. Laws 1223, the court was cognizant of new legislation (COLO. REV. STAT. ANN. §§ 148-21-1 *et seq.* (Supp. 1969)). As was stated in the case:

> Senate Bill 81 adopted in 1969 [citation omitted] was approved after the briefs were filed in this proceeding and prior to oral argument. Following oral argument the United States and the City and County of Denver filed supplemental briefs on the subject of the effect of this Act upon the questions involved, if any. Since the district court did not have this matter before it, we deem it the better part of wisdom to await its determination with respect to this matter. We do make the observation that some or all of the parties in Water District 37, as well as in similar proceedings in other parts of the state which have been held in abeyance awaiting this opinion, may conclude that the provisions of the 1969 Act are more suitable than the pre-existing statutes for adjudications involving the United States.

United States v. District Court, 458 P.2d 760, 774 (Colo. 1969), *cert. granted,* 397 U.S. 1005 (1970).

There still remains the troublesome problem concerning joining, in a supplemental adjudication proceeding, all persons whose rights might be affected by the claims of the United States. Although the Colorado Supreme Court expressed confidence in the ability of the district court to resolve this matter, it provided no opinion of its own.[61]

B. *Bills Introduced in Congress*

There have been a number of bills introduced into the Congress which have attempted to deal with water rights claimed by the United States vis-a-vis state rights. The first of these was the so-called "Barrett Bill,"[62] introduced in 1956. This bill failed to pass. Similarly, there was introduced in 1959 the so-called "Agency Bill,"[63] a compromise proposal which attempted to meet the fears aroused by the *Pelton* decision by providing that "[t]he withdrawal or reservation of surveyed or unsurveyed public lands, heretofore or hereafter established, shall not affect any right to the use of water acquired pursuant to state law either before or after the establishment of such withdrawal or reservation."[64] Incorporated in the Agency Bill was an amendment which would have supported the equal footing argument.[65] It has been speculated that the bill failed to pass because of executive opposition to this amendment.[66]

In 1965 Senator Kuchel of California sponsored a bill[67] which would have had the effect of preventing any reservation from impairing any right to the use of navigable or nonnavigable water acquired pursuant to state law either

> (1) before the establishment of such withdrawal or reservation, or (2) after the establishment of such withdrawal or reservation unless, in the latter event, a Federal statute, or an officer of the United States authorized to make such a withdrawal or reservation, shall have promulgated the purpose, quantity, and priority date of the water right reserved to the United States or otherwise established under its own laws, and such promulgation shall have antedated the initiation of the conflicting right under state law.[68]

This provision, although far from perfect, would have alleviated some of the uncertainties clouding present property rights to the use of water in the Western States, because it would have required the Federal

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[61] *Id.* at 767.

[62] S. REP. No. 863, 84th Cong., 2d Sess. (1956).

[63] *See* 2 E. MORREALE, *supra* note 16, § 107.1 n. 96.

[64] *Hearings Before the Subcomm. on Irrigation and Reclamation of the House Comm. on Interior and Insular Affairs,* 86th Cong., 1st Sess., ser. 9, at 13 (1959).

[65] See text accompanying notes 45 & 46, *supra.*

[66] 2 E. MORREALE, *supra* note 16, § 107.1.

[67] S. REP. No. 1636, 89th Cong., 1st Sess. (1965).

[68] *Id.* For a comprehensive discussion of S. 1636, see 2 E. MORREALE, *supra* note 16, § 107.2.

agencies to quantify their needs in connection with reservations. With the defeat of Senator Kuchel, however, Congress took no action on the bill.[69]

In 1967, a bill substantially similar to the Senator Kuchel proposal was introduced into the Senate[70] and was followed by a similar bill introduced in the House in 1969.[71] Affirmative action was not taken on either of these bills, and none appears planned for the immediate future.

Congressman Aspinall of Colorado had indicated that the House Interior and Insular Affairs Committee would not hold hearings on such bills until the Public Land Law Review Commission makes its report. Now that the report has been issued,[72] it remains to be seen whether the recommendations contained therein will be adopted or whether water appropriators in the Western States will be forced to continue to wait for a resolution of the federal-state conflict.

CONCLUSION

The federal government's control of navigable waters under the Commerce Clause and its claims to water rights under the Property Clause have created an atmosphere of uncertainty which threatens to impede the further orderly development of the water resources of the Western States. While state courts have attempted to delineate the extent of federal power and numerous bills have been introduced in Congress which seek to resolve the federal-state conflict and remove the cloud which hangs over the rights of those who own state granted water rights, none of these measures have been successful. Perhaps the report of the Public Land Law Review Commission and the recommendations contained therein will provide the compromise measure which will not only allow a modicum of dual sovereignty but will also define the respective power limitations.

APPENDIX*

THE IMPLIED RESERVATION DOCTRINE OF FEDERAL WATER RIGHTS

As successor to the sovereigns from which the United States obtained the vast areas of the western public domain, the Federal Government by the mid-19th century possessed complete power over the land and water of that region. Because the courts have settled the issue,

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[69] 2 E. MORREALE, *supra* note 16, § 107.2.

[70] S. REP. No. 2530, 90th Cong., 1st Sess. (1967).

[71] H.R. REP. No. 476, 91st Cong., 1st Sess. (1969).

[72] The section of the report of the Public Land Law Review Commission dealing with the federal-state conflict is set out *in toto* in the APPENDIX, at 204 *infra*.

*This APPENDIX is a portion of the chapter on Water Resources reprinted from the recent report of the Public Land Review Commission. PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S RESOURCES 141-49 (1970).

there is little to be gained in academic arguments as to whether that power derives from concepts of "ownership" as distinguished from "sovereignty": the power is plenary, whatever its conceptual basis.

By a series of acts in 1866, 1870, and 1877,[1] when Federal policy stressed the disposition of the public domain under the homestead, public sale, and other settlement and disposal laws, Congress provided that such Federal land disposals would not carry with them an accompanying water right. Rather, the water on the public lands was declared open to use, and property rights to its use were to be obtained under the laws and customs of the states and territories. As to lands retained in Federal ownership, there were none of the public land management programs we know today requiring water use on Federal lands by the Federal Government or its agents, *e.g.*, mineral leasing operations, recreation facility management, fish and wildlife protection and habitat enhancement, and so forth. Accordingly, the Federal Government did not then have to face up to whether it would comply with state water laws.

By the turn of the century, the Federal Government had started reserving public lands from disposition by setting aside national forests and parks, creating wildlife refuges, and making large-scale withdrawals for other purposes. With respect to the water needs associated with programs on these lands, the usual practice during the first half of this century was for permittees, licensees, etc., to acquire necessary water rights under state law in accordance with the policy stated in the 1866, 1870, and 1877 acts. The Federal agencies generally followed that same practice for their program needs.

In the 11 western states the predominant water right system is the law of prior appropriation, which was adopted as being most suitable to a water-short region. Under this system prior use establishes priority of right, and nonuse for prescribed periods will cause a forfeiture. In times of shortage, uses are curtailed in inverse order of their priorities. The riparian law of water rights[2] which prevailed in the more humid eastern states was rejected as unsuitable. Its principal vice was that an upstream riparian owner could do nothing indefinitely while his neighbor downstream put water to use and became dependent thereon, yet at any time the upper riparian could assert his equal right and destroy or impair the effort and investment of his neighbor.

An appropriative water right may be acquired only for a beneficial purpose, and even if the proposed type of use is beneficial under state

[1] The relevant portions of the acts are codified as 43 U.S.C. §§ 321, 661 (1964).

[2] The riparian system has three major features, all of which are the antithesis of the appropriation doctrine. First, water may be used only by a riparian landowner, on riparian land, and within the natural drainage basin of the stream from which it is taken. Second, it is neither acquired by use nor lost by nonuse. Third, it is correlative, in that all users share shortages ratably.

law, it must usually also be a reasonable use in the light of other demands for water. While there are diversities among the water laws of these states, they are generally consistent in recognizing, by statute or decision, domestic and municipal purposes, irrigation, mining, power, and manufacturing, as well as other similar uses, as beneficial.

Although the decided court cases indicate that there is no serious problem in obtaining rights for recreation and fish and wildlife conservation, several of these states do not expressly specify such uses as beneficial in their water statutes.

Nearly all state appropriative water laws also establish a system of preferences under which certain beneficial uses are preferred over others. In most of these 11 states, domestic, stock-watering, and municipal uses appear to have preferred status over irrigation, and irrigation is preferred over all the remaining uses. Recreation and fish and wildlife uses are not preferred uses in these states. This has caused concern that Federal program needs, particularly for fish and wildlife, may not be fully served if the Federal Government must rely on these state laws. However, while problems for Federal agencies may yet develop because of state laws relating to beneficial use or preferences, none has been brought to our attention.

In nearly 100 years of development, state water law has achieved a reasonable certainty of results which has permitted substantial public and private development in the West. While sometimes necessarily complex, state administrative and judicial procedures have provided a means to determine security of rights to the use of water.

However, in 1955, the Supreme Court in the *Pelton Dam* decision[3] indicated that the withdrawal or reservation of Federal lands for specified purposes also reserved rights to use water on such lands, even though the legislative or executive action made no mention of water or its use. Under this doctrine such reserved water rights would carry a priority as of the date of the reservation or withdrawal of the lands.

Although the possible consequences of the decision that state law need not control the acquisition of water rights for such "reserved" lands were disturbing to many in the western public lands states, under the facts of the case the *Pelton Dam* decision itself did not require infringement of water rights previously vested under state law. The limits and impact of the newly enunciated application of the reservation doctrine were left uncertain. However, some of the Federal agencies began to rely on this doctrine for water rights in addition to their customary compliance with state law.

In 1963, any lingering doubts about most of the implications of the reservation doctrine as a source of water rights were removed in

[3] Federal Power Comm'n v. Oregon, 349 U.S. 435 (1955).

the Supreme Court's decision in *Arizona v. California.*[4] By analogy to earlier Indian cases, and in partial reliance on the *Pelton Dam* decision, the Court sustained the conclusions of its Special Master in that case that certain reservations of public domain land for particular purposes, *i.e.,* wildlife refuges, a national forest, and a national recreation area, carried with them an "implied" reservation of sufficient unappropriated water to satisfy the reasonable requirements of those reservations without regard to the provisions of state law.

Since then, the Forest Service and the military departments have indicated that they will no longer comply with state law in acquiring rights for the use of water on reserved lands, and will rely on Federal claims arising out of the reservation or withdrawal of the public lands they administer. Other Federal agencies, such as the National Park Service, still have a policy of compliance with state appropriation procedures, but whether this will continue is uncertain.

The result has been apprehension in the western public land states that the doctrine will have the effect of disrupting established water right priority systems and destroying, without compensation, water rights considered to have vested under state law. Moreover, the uncertainty generated by the doctrine is an impediment to sound coordinated planning for future water resources development.

Legislative proposals that Congress either affirm, abolish, or clarify the reservation doctrine have been the subject of numerous hearings and discussions during the last decade, but Congress has taken no action on the matter. The issue has been one of the most controversial before the Commission.

The Commission gave much attention to the question of whether this controversy might be only a doctrinal legal argument with little substantive impact. We conclude it has substance.

Although most of the current concern relates to the doctrine's potential future impact, such potential impacts could be major.[5] This would be particularly likely on specific streams or systems where water is now virtually completely appropriated under state law.

We recommend legislative action to dispel the uncertainty which the implied reservation doctrine has produced and to provide the basis for cooperative water resources development planning between the Federal Government and the public land states.

The reservation doctrine has several advantages for the Federal Government. (1) As reservation needs develop, uses under it can expand indefinitely without regard to state water law requirements

[4] 373 U.S. 546 (1963).

[5] Even though Federal departments and agencies were requested to estimate future water needs for the use in our contract water study, the estimates provided were obviously rough, not all-encompassing, and, therefore, unconvincing. We also note that the needs expressed could not be considered as maximums.

that water be put to beneficial use within a reasonable time. (2) Vast reserves created around the turn of the century carry advantageous early priority dates vis-a-vis state-determined priorities. (3) The Federal Government need not pay any compensation for divested non-Federal rights initiated after the date of the withdrawal or reservation, however long the water may have been beneficially used. (4) The Federal use need not be "beneficial" under state law if it is within the scope of the purposes for which the reservation or withdrawal was created.

While the advantages of the reservation concept to Federal agencies are apparent, there are problems which must also be considered from the Federal standpoint. (1) In *Arizona v. California*[6] the Master required some evidence of intent for each land reservation before he would sustain an implied reservation of water. It is not clear whether such an intent would be implied for all reservations and withdrawals, although to date it appears this should ordinarily be no problem if water is essential to the express purposes of the reservation. (2) There is some doubt whether any use will be implied other than those expressly stated at the time of withdrawal. (3) It appears that where the purpose of a withdrawal or reservation is changed, the priority date of the new use will be the date of the use change and not that of the earlier use. (4) Without litigation or agreement it is not possible to determine what the maximum permissible amount of water would be for any given use. In *Arizona v. California,* for example, the amount allowed for irrigation uses was based on irrigable acreage and then current Bureau of the Budget standards of economic feasibility. The effect of future changes in feasibility standards is uncertain. (5) It is not clear what the physical relationship of the reserved land must be to the source of the water supply, *i.e.,* whether a reservation right is available for land outside the natural watershed of the river system from which the water would be drawn. (6) It is not clear whether acquisition of a state appropriative right by the Federal Government or its lessees, licensees, and permittees has the effect of waiving any reservation right to additional water for that particular use. (7) It has not been determined whether termination of a land withdrawal or reservation also terminates the reserved water right, even when the particular use continues thereafter.

Limitation of Reservation Doctrine

> Recommendation 56: The implied reservation doctrine of water rights for federally reserved lands should be clarified and limited by Congress in at least four ways: (a) amounts of water claimed, both surface and underground, should be formally established; (b) procedures for contesting each claim should be provided; (c) water requirements for future reservations should be expressly reserved; and (d) compensation

[6] 373 U.S. 546 (1963).

should be awarded where interference results with claims valid under state law before the decision in *Arizona v. California.*

Although state law appears to be generally adequate as a basis for water rights for uses on reserved public lands, the reservation doctrine should not be abrogated. To do so and to require the public land agencies to rely solely on state law for the acquisition of water rights for reserved land uses presents several problems:

(1) In some states important Federal uses, such as for recreation or fish and wildlife purposes, are either not recognized as beneficial uses or have low preferences vis-a-vis other competing uses.

(2) The implied reservation doctrine provides the necessary water rights for certain Federal uses and future needs for which state law has not been complied with for one reason or another. To discard the reservation doctrine might well place the validity of those rights in question and inject further uncertainty into this area.

Nevertheless, the implied reservation doctrine as announced and applied in *Arizona v. California*[7] has created many problems. Numerous unanswered questions about its scope and impact remain. The two most important questions which Congress should resolve, however, center on (1) the uncertainty which the doctrine has engendered, and (2) the equity of holders of water rights vested under state law, whose rights may be curtailed without compensation through its strict application. Solutions of these two critical problems will permit reliance on the reservation doctrine where necessary to assure adequate Federal water rights for the reserved public lands, and at the same time minimize disruption to existing state administrative machinery, promote more effective water resources planning, and provide equitable treatment to holders of water rights vested under state laws. Consequently, we recommend that Congress take the following legislative actions:

(1) *Provide a reasonable period of time within which Federal land agencies must ascertain and give public notice of their projected water requirements for the next 40 years for reserved areas, and forbid the assertion of a reservation claim for any quantity or use not included within such public notice.*

Some Federal agencies, in particular the Forest Service, are endeavoring to refine their data on present uses and future requirements and to provide such information to state water authorities. However, there is nothing in the present legal system which requires this or makes such quantification binding on the agencies, and they would be free to enlarge these projections in the future as they deem fit.

Most of the present uncertainties should be removed by requiring a binding quantification and delineation of Federal claims, particularly such questions as quantities of water reserved, priority of right, per-

[7] *Id.*

missible purposes and places of use, etc. These determinations might be made as part of the review of existing land withdrawals which we recommend elsewhere in this report, although a shorter time period for this effort seems desirable. In those cases where it seems likely that existing uses on reserved lands will increase to significantly larger estimated future requirements at a relatively modest rate over the 40-year period, Congress may wish to provide a means for the agencies to permit interim use of reserved water until it is needed for Federal purposes. This would promote maximum beneficial use of water and could be done through formal arrangements with the states.

(2) *Establish a procedure for administrative or judicial determination of the reasonableness of the quantity claimed, or the validity of the proposed use under present law.*

This would give an opportunity for timely contest by present users or appropriate state agencies of the quantity or legality of the use, such as whether the use is properly implied from the creation of the withdrawal or reservation. At the present time there is no procedure for doing this.

There is no effective judicial machinery to permit the resolution of the many issues raised by the reservation doctrine, even if a case-by-case approach to its clarification and refinement were desirable, and we do not believe that it is. Although the United States is free to initiate such a suit, the doctrine of sovereign immunity bars such actions by non-Federal water users or state administrative agencies unless Congress has consented to such a suit. The McCarran Act,[8] which on its face consents to certain kinds of water adjudications, is an unsatisfactory vehicle for obtaining definition of Federal reservation claims. The courts have held that *all* water users on a river system must be joined under that Act,[9] and this is not always possible or feasible. Moreover, the issue of whether the McCarran Act permits adjudication only of rights held under state law and not of Federal reserved rights, as the Department of Justice contends, is now before the United States Supreme Court.[10]

Although we elsewhere recommend that Congress provide for judicial review of public land decisions by aggrieved parties, we are not prepared to go that far with respect to all Federal water right questions. Not only are the questions more complex, but they go far beyond this Commission's jurisdiction, since they usually affect multiple-purpose project developments having little or no public land connection and are best dealt with by the National Water Commission. However,

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[8] 43 U.S.C. § 666 (1964).

[9] Miller v. Jennings, 243 F.2d 157 (5th Cir. 1957), *cert. denied*, 355 U.S. 827 (1957).

[10] United States v. District Court, 458 P.2d 760 (Colo. 1969), *cert. granted*, 397 U.S. 1005 (1970).

we do recommend provision for judicial review of at least the limited questions of the reasonableness of the quantity claimed under the reservation doctrine, its priority date, and the purposes for which the reserved water may be used.

(3) *Provide that procedures for creation of future withdrawals and reservations require, as a condition to claims of reserved water rights, a statement of prospective water requirements and an express reservation of such quantity of unappropriated water.*

This would have the effect of requiring an administrative or legislative review of these claims and substitution of express water rights reservations for potential implied claims. Coupled with the previous recommendation concerning existing reserved rights, most of the uncertainty generated by the reservation concept should be eliminated.

(4) *Require compensation to be paid where the utilization of the implied reservation doctrine interferes with uses under water rights vested under state law prior to the 1963 decision in Arizona v. California.*

When reliance is placed on Federal water rights impliedly reserved along with the reservation or withdrawal of public lands, the effect may be to displace, without compensation, other non-Federal public and private uses under water rights acquired under state law subsequent to the date when the water was impliedly reserved for the Federal lands, but prior to the date the water was actually put to use by the Federal agencies. This is the principal vice of the doctrine from the viewpoint of individual water users. Prior to the Supreme Court's decision in *Arizona v. California* in 1963, no water user could have been on actual or constructive notice of the existence of such an "implied" Federal water right. The same is true of the state administrative agencies, since as a matter of formal policy and actual practice, the public land agencies generally adhered to state law in acquiring water rights for reserved lands prior to 1963.

As a practical matter, use of the doctrine to cause actual injury to water rights vested under state law without compensation has been rare to date, and the likely future impact is uncertain. However, as a matter of policy Congress has generally provided in the Reclamation Act of 1902[11] and the Federal Power Act of 1920[12] that compensation be provided to holders of water rights vested under state law when they are interfered with by projects authorized or licensed under those two acts. We find no reason for a different policy where public land programs are involved. As a matter of fairness and equity, it is appro-

[11] 43 U.S.C. §§ 371 *et seq.* (1964).
[12] 16 U.S.C. §§ 791-825 (1964).

priate to compensate holders of vested state water rights whose uses are curtailed through Federal reliance on the implied reservation doctrine. We believe that the potential costs to the Federal Government would be relatively low. In any event, the social costs of displacing existing uses for the benefit of national programs should be borne by the Federal taxpayers, and not by the affected individual users.